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10/066,436

01/30/2002

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EXAMINER

BARRETT, THOMAS C

ART UNIT

PAPER NUMBER

3738

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/066,436
Filing Date: January 30, 2002
Appellant(s): BAKER ET AL.

MAILED

JAN 12 2007

Group 3700

John V. Hanley
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed on October 26, 2006 appealing from the Office action mailed February 28, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,122,154	Rhodes et al.	6-1992
5,275,622	Lazarus et al.	1-1994

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 22-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rhodes (5,122,154) in view of Lazarus et al. (5,275,622).

(10) Response to Argument

The Applicant argues:

"It is respectfully submitted that combining the Rhodes and Lazarus et al. references under 103 is improper because there is no suggestion or motivation, nor an objective reason for the combination. It is particularly improper here since Rhodes is concerned with avoiding the shortcomings of self-expanding structures and specifically teaches a stent formed from rigid links or struts (Col. 6, ln. 33). The combination of teachings employed in the final Office action requires Rhodes to be modified to incorporate a self-expanding frame which is, in fact, the very characteristic Rhodes seeks to avoid."

However, the motivation as noted in the Office action is "to yieldably urge the graft from a compressed position to a second expanded condition" as found in Lazarus

et al (col. 8, lines 44-49). Therefore, it is more than just "The level of ordinary skill in the art" that is relied upon for motivation. While Rhodes does teach a stent formed from rigid links or struts this does not teach away from the rigid links or struts comprising self-expanding frame.

Regarding the "shortcomings" of Rhodes, Rhodes concerns are directed towards stents, not necessarily towards stent-**grafts**. The stents Rhodes is concerned about are sleeve-like devices while the Lazarus device is a ring. In addition, the rings of Lazarus are designed to overcome some of these concerns. The Lazarus rings comprise "hook-like elements", that "should have a length which is sufficient for the hook to penetrate the vessel wall, but not through the vessel wall" (col. 9, lines 19-22). Furthermore, Rhodes states that his invention overcomes "the disadvantages of the prior art, e.g., can be used over long distances, for long segment occlusions in the vascular tree, while acting to prevent acute and chronic recurrence." The combination of Lazarus and Rhodes would still overcome the cited "disadvantages of the prior art."

The combination would not change the **principal operation** of the prior art invention being modified. The Rhodes reference would not require a substantial reconstruction and redesign of elements shown as well as a change in the basic principle under which the construction was designed to operate. Lazarus teaches (col. 14, lines 47-55):

"Because of the spring forces provided by the attachment means, it is possible that the grafts can be implanted without the use of an inflatable balloon for forcing the hook-like elements into the tissue of the vessel. However, at the present time, it is still believed to be desirable to utilize

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the balloon to ensure that the hook-like elements are firmly implanted into the wall of the vessel so as to inhibit migration of the graft within the vessel.”

Therefore, a self-expanding stent can still be expanded with a balloon and the device would still function as an endovascular bypass graft without substantial reconstruction or redesign of the elements shown.

In addition, Rhodes states that the method of use of the graft entails introducing it by utilizing “some means, e.g., disposing the sleeve on a conventional balloon catheter.” This implies that other means are possible even though a balloon catheter is preferred.

The Applicant also compares the present rejection to In re Ratti as a further argument for “teaching away”. However, unlike the Ratti decision, the “rigidity” of the device is not **required** for operation. The graft of Rhodes when combined with the ring of Lazarus would not change the **basic principle** under which the Rhodes construction is designed to operate.

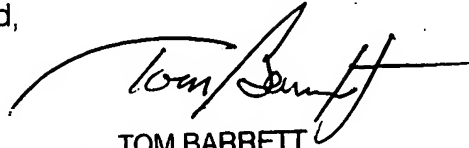
(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner’s answer.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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